DOCKET NO. FA 82-0271652	:	SUPERIOR COURT
LENORE JERJIES (NESTOR)	:	JUDICIAL DISTRICT OF HARTFORD AT HARTFORD
V.	:	
WAHEID JERJIES	:	SEPTEMBER 11, 2008

MEMORANDUM OF DECISION RE: APPEAL OF DECISION BY FAMILY SUPPORT MAGISTRATE

This is an appeal by the defendant/appellant Waheid Jerjies (hereafter "appellant") from a decision rendered by the Family Support Magistrate (Lifshitz, F.S.M.) on August 20, 2008. On that date, the appellant was found in contempt for his willful failure to make court-ordered weekly payments on a child support arrearage. The magistrate incarcerated the appellant, ordered him held until he paid a purge figure of $56,353.38, and continued the matter until September 17, 2008 for a purge review.

The appellant brings this appeal pursuant to the provisions of C.G.S. § 46b-231(n). His petition of appeal alleges various claims of error in the magistrate's decision per C.G.S. § 46b-231 (n) (7). Those claims will be discussed with greater specificity below.

This appeal was originally scheduled to be heard before the undersigned on September 3, 2008. The appellant and his counsel, Atty. Leonard Shankman, were present in court on that date. Lenore Nestor (formerly Lenore Jerjies), the

plaintiff/appellee, was not present. The appellant's counsel requested that the appeal hearing proceed on September 3rd, noting that the appellant had remained continuously incarcerated since August 20, 2008. However, the undersigned was not satisfied that the appellee had received notice of the September 3, 2008 hearing date and continued the matter until September 10, 2008. The court also ordered that the Clerk's Office attempt to serve notice of the new hearing date upon the appellee, who resides out of state.

A hearing on the appeal was held before the undersigned on September 10, 2008.[1] The appellant and his counsel were in attendance. The appellee was also present at court.

The court heard and carefully considered oral argument at the September 10th hearing. The court also carefully reviewed and considered the entire transcript of the contempt hearing that was conducted by Magistrate Lifshitz on August 20, 2008, and the sworn financial affidavit that the appellant submitted to the court on that date.

PROCEDURAL HISTORY

This is yet another proceeding in a sad and contentious child support case that has spanned more than two decades. Tragically, the child who was the subject of the support order died after reaching majority. Certain facts pertaining to the most recent procedural history of this matter are essential to a determination of this appeal.

On April 16, 2008, a hearing was held before Magistrate Lifshitz on a contempt citation that was filed against the appellant by the appellee as a result of Mr. Jerjies' alleged failure to make court-ordered child support arrearage payments to Ms. Nestor.

[1] At the conclusion of the September 10th hearing, this court rendered an oral decision pertaining to this matter. This memorandum is being filed as a more extensive recitation of the court's findings of fact and law in this matter.

Mr. Jerjies failed to appear at that hearing. The magistrate issued a capias for the arrest of Mr. Jerjies and set a $10,000 cash bond.

Mr. Jerjies was subsequently presented in court on May 21, 2008 and a hearing on the contempt citation was conducted before Family Support Magistrate Richard G. Adams. Magistrate Adams found on May 21, 2008 that the appellant owed a child support arrearage of $58,385.88 to the appellee. The magistrate vacated the capias, and ordered the appellant to make payments of $52.50 each week on that arrearage. The appellant was also ordered to pay the sum of $1,000 on deposit with the court by August 20, 2008. The court continued the matter until August 20, 2008 for a compliance review hearing.

On August 20, 2008, the appellant and his attorney appeared before Magistrate Lifshitz at the compliance review hearing. The appellee also attended this proceeding.

At the hearing, Support Enforcement Officer Tricia Williams reported that Mr. Jerjies had not made any of child support arrearage payments of $52.50 each week that Magistrate Adams had ordered him to pay three months earlier. However, Ms. Williams also reported that Mr. Jerjies had come to the August 20th hearing with the sum of $1,682.50 in order to pay the $1,000 deposit to the court, and in order to satisfy with a lump sum payment the $682.50 arrearage that had accrued on his weekly arrearage payment obligation since May 21st.

Magistrate Lifshitz noted that Mr. Jerjies' payment of $1,000 to the court on August 20th complied with Magistrate Adams' earlier order that the appellant make the deposit by that date. However, the magistrate also found on August 20th that the appellant was in contempt of the court order because he had not made the arrearage

payments of $52.50 per week between May 21, 2008 and August 20, 2008. Magistrate Lifshitz ordered that the $1,000 deposit and $682.50 lump sum payment that Mr. Jerjies had brought to court be paid to the appellee as partial payment of the total child support arrearage owed to her. After deducting that sum, the magistrate found a new arrearage of $56,353.38. Magistrate Lifshitz ordered Mr. Jerjies to pay the full arrearage sum of $56,353.38 as a purge figure, and also ordered that the appellant remain incarcerated until he did so. The court scheduled a purge review hearing for September 17, 2008.

DISCUSSION

In his appeal, Mr. Jerjies claims that the support magistrate's finding of contempt, and the purge figure were both erroneous because they violated the provisions of C.G.S. § 46b-231(n)(7). That statute provides:

> "The Superior Court may affirm the decision of the family support magistrate or remand the case for further proceedings. The Superior Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the decision of the family support magistrate is: (A) In violation of constitutional or statutory provisions; (B) in excess of the statutory authority of the family support magistrate; (C) made upon unlawful procedure; (D) affected by other error of law; (E) clearly erroneous on the whole record; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Citing C.G.S. § 46-231 (n) (7), the appellant argues that the finding of contempt was erroneous because he was in monetary compliance with the court order on August 20th, and because there was no evidence that his conduct was willful. Specifically, the appellant argues that by paying the lump sum of $1,682.50 on August 20th he had satisfied the orders rendered by Magistrate Adams on May 21st. The appellant further asserts that the evidence presented at the August 20th hearing did not

support the magistrate's finding that he had willfully failed to make weekly payments of $52.50.

It is important to reiterate that the contempt finding at issue in this appeal did not involve the appellant's payment of the $1,000 to the court on August 20th. Magistrate Lifshitz clearly found that the appellant's payment of that deposit on August 20th complied with the May 21st orders.

The transcript of the August 20th hearing indicates that Mr. Jerjies was found in contempt solely because he had not made any of the court-ordered weekly arrearage payments of $52.50 between May 21, 2008 and the date of the compliance review hearing. (Transcript, Page 2, Lines 11-14; Page 8, Lines 1-4; Page 8, Line 60; Page 15, Lines 19-21).

The hearing record also reflects that the magistrate reviewed and considered the sworn financial affidavit that the appellant filed with the court on August 20, 2008. The appellant's affidavit stated that he received a net weekly wage of $500. It indicated that he was employed as a painter by an entity known as Royal Décor of Farmington, Connecticut. The affidavit listed total weekly income from all sources of $2,162 and total weekly expenses of $2,162. Although the magistrate questioned the accuracy of the notation that the appellant received weekly income from all sources in the amount of $2,162, the record does not reflect that the appellant offered any explanation about that entry, or whether or not it was correct. The appellant's sworn financial affidavit listed no debts, other than the mortgage on his home, and lease payments of unspecified amounts on one of the two automobiles in his possession. The sworn affidavit also stated that the appellant owned a home in East Hampton, Connecticut worth 300,000.

That property is encumbered with a mortgage of $280,000 and has equity of $20,000. The appellant also owns a 2000 Chevrolet Silverado valued at $2,500. (At the appeal hearing before this court, the appellant attempted to introduce evidence that his financial affidavit had been in error, and that he did not own the home in East Hampton. The court did not permit that evidence to be introduced, and decided this appeal based upon the whole record of the proceeding before the magistrate on the August 20, 2008 hearing. See C.G.S. § 46b-231 (n) (5).)

Based on the information set forth in the appellant's August 20, 2008 financial affidavit, this court finds that the family support magistrate could have reasonably concluded that the appellant was employed, was earning a weekly wage of at least $500 from his occupation, owned a home with equity of $20,000, had two automobiles, and was apparently able to meet his weekly living expenses without accruing any significant debts, except for his mortgage and car lease payments.

Furthermore, the appellant admitted at the hearing that he had not made the required weekly payments, and offered various conflicting explanations about why he had not done so. Mr. Jerjies asserted that he did not understand that he had the dual obligation to make both the weekly payments before August 20th, and to pay the $1,000 deposit to the court on that date. (Transcript Page 11, Line 11, Page 11, Line 17.) Mr. Jerjies also claimed that he could not afford to make the payments. He told the magistrate: "I can't afford what I can't pay. If I don't have it, I have to borrow it . . ." (Transcript Page 12, Lines 6-8.) The appellant also informed the court that he had failed to make the court-ordered weekly arrearage payments because he didn't want his wife to know about this case. (Transcript Page 8, Lines 8-10). He also said that the case was

"bogus" and at one point told the magistrate: "I should not pay $100,000 for something I didn't do." (Transcript Page 8, Lines 17-18).

The family support magistrate was not obligated to credit the appellant's explanations. "The court is free to reject testimony it does not find credible." *Emanuelson v. Emanuelson*, 26 Conn. App. 527, 532 (1992); See also *Doody v. Doody*, 99 Conn. App. 512 (2007). The transcript of the hearing clearly indicates a finding on the record by the family support magistrate that he did not believe the appellant's claim about misunderstanding the prior court order. (Transcript Page 14, Lines 2-14). Magistrate Lifshitz also found at the hearing that Mr. Jerjies had sufficient income to pay the weekly orders (Transcript Page 15, Lines 19-21), and that his failure to so was willful and contemptuous. (Transcript Page 16, Lines 22 -23).

This court is very mindful that noncompliance alone will not support a finding of contempt. *Prial v. Prial*, 67 Conn App 7 (2001). A court may not find a person in contempt without considering the circumstances surrounding the violation to determine whether such violation was willful. *Eldridge v. Eldridge*, 244 Conn. 523 (1998). Inadvertent failure to comply, or a misunderstanding of the court's order, does not constitute contempt.

Having carefully examined the whole record of the August 20, 2008 hearing, this court finds that there was clear and convincing evidence that supported the magistrate's contempt finding. There was uncontroverted evidence that the appellant had net weekly income of $500 per week, was paying his weekly expenses, which included the mortgage on a $300,000 home and a car lease, and that he had not accrued any significant liabilities, other than the mortgage and auto lease payments. The magistrate

was legally justified in finding, as he did, that the appellant's failure to pay the appellee $52.50 on a weekly basis was willful and contemptuous.

Furthermore, this court is not persuaded by the appellant's argument that his payment of $682.50 on the hearing date legally precluded a finding of contempt by the magistrate. The appellant was ordered to pay the arrearage on a **weekly basis**, and the appellee was entitled to receive that money according to the schedule ordered by the court. The appellee suffered financial harm every week that the appellant failed to pay her. Put simply, although the appellant's lump sum payment on August 20th may have helped to rectify the injury that his nonpayment caused, it did not eliminate nor excuse the fact that he had caused that injury.

The transcript of the August 20, 2008 hearing indicates that the family support magistrate was very familiar with this case, and with the appellant's longstanding history of disobeying the court's lawful child support orders. Given that history, the large amount of the arrearage, and the appellant's attitude and statements to the court at the August 20th hearing, the magistrate had ample reason to conclude that the appellant will probably never willingly comply with the court orders that he consistently make periodic arrearage payments. "The court may consider the demeanor and attitude of the parties." *Sander v. Sander*, 96 Conn. App. 102 (2006). Based on the foregoing, this court finds that the magistrate's August 20th order that the $1,000 deposit and the arrearage sum of $682.50 be immediately paid to the appellee was legally and factually justified.

The appellant's final claim of error deals with the magistrate's order that the appellant was to be incarcerated until he purged himself of contempt by paying the appellee the sum of $56,353.38. The purge figure was the total arrearage balance (after

deduction of the $1,682.50 that Mr. Jerjies brought to the hearing) that the appellant owed to the appellee on August 20, 2008.

Connecticut case law is clear that a civil contempt order must be remedial and coercive, and not punitive. *Board of Education v. Shelton Education Association*, 173 Conn. 81 (1977). It is axiomatic that in order for a contempt order to accomplish its desired result, the subject of the order must have the present capacity to comply with the court's directives. Our Supreme Court has specifically held that in a civil contempt proceeding, the contemnor must be in a position to purge himself of contempt (internal citations omitted). *Mays v. Mays*, 193 Conn. 261, 266 (1984). As the Supreme Court noted in that case: "An order of confinement upon an adjudication of contempt must provide the contemnor with the keys to his release in terms which are not impossible for him to satisfy." Id., 266-277.

In the present case, the magistrate did not articulate on the record the basis for his determination that the appellant should pay a purge figure of $56,353.38. Additionally, this court's review did not reveal any evidence in the record supportive of the finding that the appellant was financially able to pay that total sum. The defendant's financial affidavit indicated that his only assets were $20,000 in home equity, and a car valued at $2,500. When asked at the August 20th hearing if he had money to satisfy the purge figure, the appellant responded that he did not.

Based on its review, this court finds that the magistrate's order that the appellant pay the purge figure of $56,353.38 was "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." (C.G.S. § 46b-231 (n) (7)).

The August 20, 2008 decisions of the family support magistrate that found the appellant in contempt and ordered that the sum of $1,682.50 be paid to the appellee are hereby **AFFIRMED**. The magistrate's decision that the appellant be incarcerated until he pays a purge figure of $56,353.50 is hereby **REVERSED**. The court orders that the appellant be immediately released from custody.

Pursuant to the provisions of C.G.S. § 46b-231 (n) (7), this case is **remanded** to the Family Support Magistrate Division of the Superior Court **for further proceedings** in accordance with this decision. A hearing on this matter shall be conducted there on October 15, 2008 at 10 a.m. At said hearing, the family support magistrate shall determine the total amount of the arrearage then owed by the appellant, and shall establish such future orders of periodic payments, lump sum payments, and cash deposits that the magistrate determines the appellant is financially able to pay on the child support arrearage owed to the appellee.

Pending that hearing, the court orders the appellant to pay to the appellee the sum of **$52.50 each week** on the child support arrearage. The court further orders that the appellant shall appear promptly before the magistrate on October 15, 2008, and shall bring the following documents with him to said hearing: Copies of his 2006 and 2007 federal and state income tax returns (or supporting financial documents concerning all wages and income earned by him during those years if income tax returns were not submitted for those years); pay stubs or a statement from his employer listing all income that the appellant has earned during 2008; the most recent statement from any savings, checking or investment account that he owns, or on which he is a signatory, and a signed letter or statement from his employer that indicates the name and address of the business

or entity by which he is employed, the number of hours he works each week, his hourly or weekly salary, and the nature of his occupation.

It is the court's intention that its order requiring the appellant to pay the appellee the sum of $52.50 each week be an interim order in the event that any appeal of this decision is taken by any party to the Appellate Court.

SO ORDERED.

Dated at Hartford Connecticut this 11th day of September, 2008.

BY THE COURT,

Dyer, J.